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"Privilege Against Public Right:" A Reappraisal of the Charles River Bridge Case

*Robert E. Mensel**

INTRODUCTION

> I am the last of the old race of Judges. I stand their solitary representative, with a pained heart, and a subdued confidence . . . I am in the predicament of the last survivor.[1]

When the aging Justice Joseph Story wrote these wistful words to Harriet Martineau, he was expressing much more than his profound disagreement with the Supreme Court's interpretation of the Contracts Clause of Article I, section 10 of the United States Constitution,[2] in *Charles River Bridge v. Warren Bridge*.[3]

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1. Letter from Justice Joseph Story to Harriet Martineau (April 7, 1837), *in* 2 LIFE AND LETTERS OF JOSEPH STORY, 275-77 (William W. Story ed., 1851).

2. Article I, section 10, clause 1 provides as follows:

> No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.

U.S. CONST. art. I, § 10, cl. 1.

3. 36 U.S. (11 Pet.) 420 (1837) [hereinafter *The Charles River Bridge Case*].

He was lamenting the passing of an era, and of a "race" to which he did not properly belong, but with which he strongly identified.[4] He was also lamenting the apparent failure of his own efforts to build a conservative national law that would help preserve the young republic and ensure both economic development and economic stability by giving strong protection to vested property rights.[5]

Generally, historians have taken Story's concerns at face value. They have understood the case to signal the destruction of vested rights, which Story so feared. But they have seen that destruction as serving the interests of economic development, and as being necessary to economic development in the nineteenth century United States.[6] They have seen *The Charles River Bridge Case* as a moment when the future was irrevocably changed by a prudent choice between the irreconcilable opposites of "privilege and creative destruction."[7]

This article combines close analysis of the arguments and opinions in the case with consideration of new and pathbreaking work in legal history, to suggest a very different interpretation of the case. Under this new interpretation, *The Charles River Bridge Case* was important because the Court, under the new Chief Justice, declined an opportunity to expand federal jurisdic-

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The Supreme Court held under Article I, section 10, the Contracts Clause of the Constitution, that state legislation chartering a corporation to provide some public benefit or service, such as a bridge, turnpike, or ferry, must be construed strictly against the corporation. *The Charles River Bridge Case*, 36 U.S. (11 Pet.) at 535. Under this rule, which favored the powers of legislatures over the rights of franchisees, only those rights explicitly granted to the corporation, within the terms of the charter, would be recognized as entitled to protection under the contracts clause. *Id.* No rights would be held to have passed by implication to the corporation. *Id.* at 530.

As a consequence of adopting this rule of construction of public charters, the Court ruled that the Charles River Bridge Proprietors had no vested right in the tolls collected by travelers crossing the Charles River Bridge between Boston and Charlestown. *Id.* The state was free to charter a competing bridge, a scant few yards away, that would diminish the tolls collected by the Charles River Bridge Proprietors, and thereby reduce and eventually destroy the value of their franchise. *Id.* at 529. The Court rejected the Charles River Bridge Proprietors' argument that their charter carried with it an implied right to the exclusive occupation of the line of travel between Boston and Charlestown, and to the collection of tolls from all who passed over that line of travel. *Id.* at 530.

4. *See* GERALD T. DUNNE, JUSTICE JOSEPH STORY AND THE RISE OF THE SUPREME COURT (1970); R. KENT NEWMYER, SUPREME COURT JUSTICE JOSEPH STORY, STATESMAN OF THE OLD REPUBLIC (1985).

5. R. Kent Newmyer, *Harvard Law School, New England Legal Culture, and the Antebellum Origins of American Jurisprudence*, 74 J. AM. HIST. 154 (1987).

6. See text accompanying notes 34-44.

7. *See* STANLEY I. KUTLER, PRIVILEGE AND CREATIVE DESTRUCTION: THE CHARLES RIVER BRIDGE CASE 155-71 (1971).

tion to include all contractual transactions between a state and its citizens,[8] and because it allowed Jacksonian jurisprudence to intrude into constitutional law.[9]

The Charles River Bridge Case was more about politics than about political economy. In order to demonstrate this, I first introduce certain essential aspects of the political and cultural history of the period. I then discuss the history and historiography of the case together, highlighting those aspects of the Court's opinion on which historians have based the prevailing view of the significance of the case. The three major difficulties with the prevailing view of the case are then exposed. My interpretation follows, together with an epilogue that discusses the significant uses to which the case was put when cited later by state and federal courts. What emerged was not a creative act of destruction of vested rights, intended to unleash the forces of economic development, but a decision intended to protect community interests from an excessive and greedy individualism.

The decades of the 1820s and 1830s were shaped by the mythologized memory of the revolutionary era, and in particular, by the sense of loss accompanying the passing of the generation of revolutionary heroes.[10] With the passing of the founders, the succeeding generation was forced to confront the question of whether the republic could survive without their guidance.[11] The stunning coincidence of the nearly simultaneous deaths of John Adams and Thomas Jefferson, on July 4, 1826, exactly fifty years after the signing of the Declaration of Independence, plunged the young nation into a deep and melancholy sense that it had entered into what George Forgie calls a "post-heroic age," an age bereft of the strong guiding hands of the founding fathers.[12]

The founders were memorialized in a large body of hagiographic literature that exhorted the next generation to honor them and preserve their carefully crafted republic by emulating their virtuous character.[13] The significance of political disagree-

8. See text accompanying notes 94-108.

9. See text accompanying notes 137-72.

10. *See generally* GEORGE B. FORGIE, PATRICIDE IN THE HOUSE DIVIDED: A PSYCHOLOGICAL INTERPRETATION OF LINCOLN AND HIS AGE (1979).

11. FORGIE, cited at note 10. For discussion of the concerns about the survival of the republic, see GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787, at 91-93, 118-24 (1969); and BERNARD BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION 280-301 (1967).

12. FORGIE, cited at note 10, at 51-53. Chancellor Kent summarized this anxiety in the following words, "[n]ow we sadly realize that we are to be under the reign of little Men — a pygmy race & that the sages of the last age are extinguished." Letter from Chancellor Kent to Justice Story, June 23, 1837, *in* STORY, cited at note 1 at 270-71.

13. FORGIE, cited at note 10, at 26-31, 44-45. For a discussion of the tradition

ment among the founders was elided, and they were presented as generally unified in character, if not in the particulars of their political agendas.[14] The tenor of this literature was generally conservative, and even regressive.[15]

The post-heroic age came last of all to the judiciary. Its founding hero, Chief Justice John Marshall, endured on the bench for thirty-four years, until his death on July 6, 1835. Even before his death, Marshall had become a symbol of continuity and conservatism in the law. The hagiography of John Marshall began in 1833 with Story's *Commentaries on the Constitution.*[16] R. Kent Newmyer has identified this enormous work as Story's effort to will into existence a national jurisprudence, a centralization and systemization of the law according to principles agreeable to New England conservatives.[17] Story's method combined the classical treatise on the law[18] with an apotheosis of Marshall based upon his constitutional decisions.[19] As Washington's military and political genius reflected his character and demanded emulation, so Marshall's jurisprudential genius reflected his character, and also demanded emulation by judges and legal scholars.[20] Story hoped that by perpetuating "the old and settled law" he would help perpetuate the young and unsettled republic.[21]

Marshall's death plunged Story into a deep depression, rooted both in personal loss and political pessimism.[22] When President Andrew Jackson filled the enormous void with the undistinguished party man Roger Taney, Story found himself sitting next to the personification of the post-heroic era of the judiciary.[23]

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of Washington hagiography, see WILLIAM A. BRYAN, GEORGE WASHINGTON IN AMERICAN LITERATURE, 1775-1865, at 86-120 (1952). Chief Justice John Marshall himself wrote one of the leading biographies of Washington, entitled THE LIFE OF GEORGE WASHINGTON, COMMANDER IN CHIEF OF THE AMERICAN FORCES, DURING THE WAR WHICH ESTABLISHED THE INDEPENDENCE OF HIS COUNTRY, AND FIRST PRESIDENT OF THE UNITED STATES (1926).

14. FORGIE, cited at note 10, at chapter 1.

15. *Id.*

16. JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION (1833).

17. Newmyer, cited at note 5, at 162, 172-73.

18. For a discussion of the form of the classical legal treatise and Thomas Jefferson's use of it in his NOTES ON THE STATE OF VIRGINIA (1787), see ROBERT A. FERGUSON, LAW AND LETTERS IN AMERICAN CULTURE 42-58 (1984).

19. The treatise was dedicated to Marshall.

20. *See* Justice Joseph Story, *Life of Chief Justice Marshall, in* 1 AM. L. REV., 243-301 (1843). Newmyer has demonstrated that the revival of Harvard Law School in 1829, the year of Andrew Jackson's inauguration, was part of Story's larger effort to resist the incursion of democratic influences in the law. *See* Newmyer, cited at note 5.

21. NEWMYER, cited at note 4, at 158-69, 365.

22. *Id.* at 196-97. Story's eulogy of Marshall, while highly stylized and elaborate, gives evidence of his sense of personal loss and his political pessimism. *Id.*

23. *See* DUNNE, cited at note 4, at ch. 27; R. KENT NEWMYER, THE SUPREME

Story's Whig contemporaries shared his sense that the transition from the Marshall Court to the Taney Court was momentous and hazardous.[24] The decision in *The Charles River Bridge Case,* Taney's first as Chief Justice, served only to increase their fears. Chancellor James Kent regarded the decision with "disgust," and wrote to Story that he had "lost [his] confidence and hopes in the constitutional guardianship and protection of the Supreme Court."[25] Story's melancholy and Kent's disgust arose from their sense that the new Court had threatened the security of property and rejected the "authority of the old settled law," which both were so deeply engaged in perpetuating.[26] Without "the constitutional guardianship and protection of the Supreme Court," the security of the republic itself fell into doubt.[27]

Ever on the lookout for important historical junctures, for those moments when clear choices were made and a course for the future charted, some historians have seized upon Story's view that the decision in the case was momentous. They have accepted Story's perception that the decision marked a sharp discontinuity which ended the relative stability of the era of the founding heroes and the Marshall Court.[28] They have used this perception of discontinuity to define the boundaries of a new era. However, they have not seen the change in entirely negative terms, as Story did. They have seen it as a spark that caused an explosion of economic expansion and development.[29] They have given us a

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COURT UNDER MARSHALL AND TANEY (1968); 2 CHARLES WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 1-38 (1937); Louis B. Boudin, *John Marshall and Roger B. Taney,* 24 GEO. L.J. 864, 887-95 (1936); William L. Ransom, *Roger Brooke Taney: Chief Justice of the Supreme Court of the United States (1836-1864),* 24 GEO. L.J. 809, 815-16 (1936).

24. WARREN, cited at note 23.

25. Letter from Chancellor James Kent to Justice Joseph Story (June 23, 1837), *reprinted in* WARREN, cited at note 23, at 29 [hereinafter Kent Letter].

26. Kent Letter, cited at note 25.

27. Warren Dutton, counsel for the Charles River Bridge Proprietors, alluded to this concern when he argued, "if men were to deal with each other as this act deals with the plaintiffs, the very frame-work of our civil polity would be broken down; all confidence would be destroyed; and all sense of security for the rights of persons and property would be lost." *The Charles River Bridge Case,* 36 U.S. (11 Pet.) at 454.

28. For a brilliant cultural and psychological history of that perception, see FORGIE, cited at note 10. For general discussions of the political history of the period, see SHAW LIVERMORE, JR., THE TWILIGHT OF FEDERALISM: THE DISINTEGRATION OF THE FEDERALIST PARTY 1815-1830 (1962); RICHARD P. MCCORMICK, THE SECOND AMERICAN PARTY SYSTEM: PARTY FORMATION IN THE JACKSONIAN ERA (1966); EDWARD PESSEN, JACKSONIAN AMERICA: SOCIETY, PERSONALITY, AND POLITICS (rev. ed. 1978); ARTHUR M. SCHLESINGER, JR., THE AGE OF JACKSON (1945); GLYNDON G. VAN DEUSEN, THE JACKSONIAN ERA, 1828-1848 (1959).

29. KUTLER, cited at note 7, at 155-71; J. WILLARD HURST, LAW AND THE CONDITIONS OF FREEDOM IN THE NINETEENTH-CENTURY UNITED STATES 27-29 (1956).

historiography of *The Charles River Bridge Case* which interprets it as a watershed in law and political economy. It is generally presented as a choice between two clearly defined, antithetical courses of action, one based on the "old settled law"[30] of James Kent and Joseph Story, the other based on the chaotic, pro-developmental instrumentalism of Roger Taney.[31]

This view of the case depends heavily upon the work of James Willard Hurst. In fact, the leading monograph on *The Charles River Bridge Case*, Stanley Kutler's *Privilege and Creative Destruction: The Charles River Bridge Case*,[32] can be read as an extended footnote to Hurst's work, especially *Law and the Conditions of Freedom in the Nineteenth-Century United States*.[33] Hurst argued that nineteenth century American law was primarily individualistic, instrumental, and pro-developmental, intended to "protect and promote the release of individual creative energy."[34] Hurst characterized nineteenth-century American legal culture as follows:

> We were a people going places in a hurry. Men in that frame of mind are not likely to be thinking only of the condition of their brakes. Thus, as we examine further we find that prevailing nineteenth-century attitudes in fact made private property pre-eminently a dynamic, not a static institution. Our situation was inappropriate to the growth of a dominant *rentier* interest, merely sitting on its possessions. We did not devote the prime energies of our legal growth to protecting those who sought the law's shelter simply for what they had; our enthusiasm ran rather to those who wanted the law's help positively to bring things about.[35]

Building upon Hurst's analysis, Kutler and others have argued that the Supreme Court in *The Charles River Bridge Case* favored development by destroying the privileges and vested rights of the old bridge's proprietors, and endorsing the creation of the new bridge. In their interpretation, this was intended to spark a great Hurstian release of energy among transportation enterprises. Historians generally see the Court casting an eye forward to the approaching era of the railroads, and tailoring legal doctrine

30. Kent Letter, cited at note 25.

31. By "instrumentalism" I mean an understanding that the law is not characterized by any necessary internal coherence, but solely, or nearly so, by its function or effect. J. Willard Hurst captured this understanding when he described American law in the nineteenth century as "law not so much as it may appear to philosophers . . . . [But] law that is formed largely by the imperatives of action." HURST, cited at note 29, at 5.

32. KUTLER, cited at note 7.

33. HURST, cited at note 29.

34. *Id.* at 6.

35. *Id.* at 9-10.

to facilitate their development.[36] Kutler argues that "the question of bridges was only a cover for the problems and higher stakes involving railroad development."[37] Both Hurst and Kutler point to language in Taney's majority opinion in which he explicitly discussed the railroads in a manner which suggested sympathy to their legal needs.[38] Taney wrote as follows:

> If this court should establish the principles now contended for, what is to become of the numerous railroads established on the same line of travel with turnpike companies; and which have rendered the franchises of the turnpike corporations of no value? Let it once be understood that such charters carry with them these implied contracts, and give this unknown and undefined property in a line of travelling, and you will soon find the old turnpike corporations awakening from their sleep, and calling upon this court to put down the improvements which have taken their place. The millions of property which have been invested in railroads and canals, upon lines of travel which had been before occupied by turnpike corporations, will be put in jeopardy. We shall be thrown back to the improvements of the last century, and obliged to stand still until the claims of the old turnpike corporations shall be satisfied, and they shall consent to permit these States to avail themselves of the lights of modern science, and to partake of the benefit of those improvements which are now adding to the wealth and prosperity, and the convenience and comfort, of every other part of the civilized world.[39]

This passage has carried enormous weight in the historiography of American law. It has been read as the "true" reason for the decision in *The Charles River Bridge Case*.[40] It has also been read as the classic illustration of Hurst's theory, as an opinion which dashed the expectations of the old *rentier* capitalists and hitched the country's economic hopes to the dynamic capital of the new railroads.[41] Hurst and Kutler have not recognized any particular jurisprudential coherence in the Court's opinion; they have not characterized it as the harbinger of any new system or style of thought. In their view it was simply instrumental. Kutler's analysis carries a faint echo of Story's perception of declension, yet he seems to see "creative destruction" as necessary and somehow inevitable.[42]

The difficulty with this view is that it springs, in part, from an

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36. *Id.* at 10; Boudin, cited at note 23.

37. KUTLER, cited at note 7, at 50.

38. HURST, cited at note 29, at 28; KUTLER, cited at note 7, at 93.

39. *The Charles River Bridge Case*, 36 U.S. (11 Pet.) at 552-53.

40. HURST, cited at note 29, at 28; KUTLER, cited at note 7, at 93-95, 155-61.

41. Henry F. Graff, *The Charles River Bridge Case*, *in* QUARRELS THAT HAVE SHAPED THE CONSTITUTION 71 (John A. Garraty ed., 1987); KUTLER, cited at note 7; NEWMYER, cited at note 4, at 225; HURST, cited at note 29, at ch. 1.

42. *See, e.g.*, KUTLER, cited at note 7, at 16, 93.

assumption that Jacksonian jurisprudence was fundamentally instrumental and developmental, and lacked any other systematic coherence.[43] It springs also from a too ready acceptance of Taney's dictum concerning railroads as both an accurate assessment of the consequences of vested rights doctrine, and as a straightforward statement of the basis for the decision.

My analysis demonstrates that the prevailing understanding of the case is misconceived, because it is based upon a literal understanding of the famous dictum, which, far from providing a rationale *ad terrorem* for the decision, was intended as a caricature, a *reductio ad absurdum*, of a position not seriously advocated before the Court. I show also that portions of Taney's opinion other than the famous dictum reveal the true basis of the decision, a basis more easily recognized in light of recent pathbreaking work on previously ignored aspects of jurisprudence in the early republic. Implicit in my critique is a vision of a coherent Jacksonian jurisprudence, the outlines of which have recently been uncovered by legal historians who have begun to redefine the history of antebellum law in America.[44]

THE CHARLES RIVER BRIDGE CASE

The Charles River Bridge was erected in 1785 and 1786, pursuant to a charter granted to the bridge proprietors ("Charles River Bridge Proprietors") by the Commonwealth of Massachusetts.[45] The Charles River Bridge Proprietors were granted corporate status and authorized to raise capital by selling shares in the corporation. They were to use the money to build a bridge connecting Boston with Charlestown, at the site of the ferry then owned by Harvard College.[46] The Charles River Bridge Proprietors were granted the privilege of collecting tolls, at rates specified in the charter, for forty years.[47] They stood to profit to the extent that toll receipts exceeded the cost of constructing and maintaining the bridge, over the period of the charter.

In 1792, when the legislature chartered a bridge connecting

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43. *See, e.g.*, HURST, cited at note 29, at 5.

44. *See* ROBIN L. EINHORN, PROPERTY RULES: POLITICAL ECONOMY IN CHICAGO, 1833-1872 (1991); William W. Fisher III, The Law of the Land: An Intellectual History of American Property Doctrine, 1776-1880 (1991) (unpublished Ph.D. dissertation, Harvard University); William J. Novak, Salus Populi: The Roots of Regulation in America (1992) (unpublished Ph.D. dissertation, Brandeis University).

45. 1784 Mass. Acts 53; *The Charles River Bridge Case*, 36 U.S. (11 Pet.) at 420; Commonwealth v. County Commissioners, 25 Mass. (8 Pick.) 342, 345 (1829); KUTLER, cited at note 7, at 1.

46. 1784 Mass. Acts 53.

47. *Id.*

Cambridge and Boston, it extended the duration of the toll privilege on the Charles River Bridge to seventy years, in recognition of the diminution of tolls which was sure to result from the erection of the new bridge.[48] The bridge franchise turned out to be phenomenally profitable, generating as much as thirty thousand dollars per year in profits.[49] It is thought to have been one of the most successful business enterprises in American history to that time.[50]

In 1828, as a result of popular agitation for a free bridge, the legislature chartered a corporation to build a second bridge connecting Charlestown with Boston, a scant few yards from the Charles River Bridge.[51] The new Warren Bridge corporation was to collect tolls only for such time as would be necessary to recoup the proprietors' (the "Warren Bridge Proprietors") investment, with interest.[52] Ownership of the bridge would then revert to the state, and passage would be free. The new corporation was given eminent domain powers and was required to compensate the owners of any real property taken for construction of the bridge.[53] Its charter included no provision for compensation for incorporeal property, such as the Charles River Bridge franchise. However, it explicitly relieved the Charles River Bridge Proprietors of one half of the annuity which they were required to pay Harvard College for the ferry franchise which had been destroyed by the construction of the first bridge. The Warren Bridge Proprietors were obliged to make up the difference.[54]

The Charles River Bridge Proprietors filed a bill in equity in state court, seeking to have the construction of the new bridge

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48. 1791 Mass. Acts 62 (enacted March 9, 1792); Proprietors of Charles River Bridge v. Proprietors of Warren Bridge, 24 Mass. (7 Pick.) 344, 498 (1829) (Putnam, J.), *aff'd*, 36 U.S. (11 Pet.) 420 (1837) [hereinafter *Charles River Bridge*]; Huntington v. Am. Bank, 23 Mass. (6 Pick.) 340, 345 (1828).

49. MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1780-1860, at 130 (1977).

50. HERBERT HOVENKAMP, ENTERPRISE AND AMERICAN LAW, 1836-1937, at 112 (1991).

51. 1827 Mass. Acts 127. The new bridge was approximately 90 yards from the old bridge on the Charlestown side, and 300 yards away on the Boston side. Graff, cited at note 41, at 77.

52. *The Charles River Bridge Case*, 36 U.S. (11 Pet.) at 427.

53. 1827 Mass. Acts 127; *Charles River Bridge*, 24 Mass. (7 Pick.) at 345.

54. It was not uncommon at the time for charters of later franchises, which diminished the trade of earlier established competitors, to provide explicitly for compensation for those competitors, often in the form of stock in the later chartered enterprise. The annuity granted to Harvard College as former owner of the ferry was an example of this practice. *See, e.g.*, 1830 Maryland Acts 158; 1827 Mass. Acts 127; 1784 Mass. Acts 53; Washington & Baltimore Turnpike Rd. Co. v. Baltimore & Ohio R.R., 23 Md. (10 G. & J.) 259 (1839); *Charles River Bridge*, 24 Mass. (7 Pick.) at 499 (Putnam, J.).

enjoined.[55] The Supreme Judicial Court denied the plaintiffs' request for a preliminary injunction, holding that the apparent conflict over legislative grants could not be ruled upon until after a hearing on the merits, and, in any event, that the plaintiffs would not suffer irreparable harm by the construction of the new bridge.[56]

When the four-judge court finally addressed the merits of the case, after the new bridge had been completed, it divided evenly and no relief was granted.[57] The Justices addressed the questions before them in the familiar discourse of grants, contracts, and vested rights. Chief Justice Isaac Parker and Justice Samuel Putnam agreed with the plaintiffs' argument that the charter of the old bridge implicitly granted an exclusive right to take tolls from anyone traveling between Charlestown and Boston. Because the new bridge collected tolls that would otherwise have been collected by the old bridge, the charter of the new bridge impaired the obligation of the old bridge's charter, which all agreed was a contract between the state and the proprietors of the old bridge.[58] The Warren Bridge charter thereby violated the Contracts Clause of Article I, section 10, of the United States Constitution, and also took the plaintiffs' property without compensation, in violation of Article 10 of the declaration of rights of the Massachusetts Constitution.[59] The other two justices, Marcus

55. The Proprietors of Charles River Bridge v. The Proprietors of Warren Bridge, 23 Mass. (6 Pick.) 376, 376 (1828).

56. *Charles River Bridge*, 24 Mass. (7 Pick.) at 348.

57. *Id.* at 530. The Justices delivered their opinions *seriatim* beginning at page 443.

58. That question had been settled in Dartmouth College v. Woodward, 17 U.S. (4 Wheat.) 518 (1819). *Contra* Bank of Toledo v. City of Toledo, 1 Ohio St. 622, 629 (1853), in which the Ohio Supreme Court rejected the holding in *Dartmouth College* on the grounds that it had brought "evil consequences to the community" by "shielding corporations from responsibility and correction for the abuse of their corporate franchises." The court held that the charter of the Bank of Toledo was not a contract, but an act of legislation, and that a unilateral change in the terms of the tax burden imposed upon it was not a violation of the Contracts Clause of the federal Constitution. *Bank of Toledo*, 1 Ohio St. at 629.

59. *Charles River Bridge*, 24 Mass. (7 Pick.) at 503-05 (Putnam, J.), 524-32 (Parker, C.J.). Article 10 of the Declaration of Rights of the Massachusetts Constitution, provides:

> Each individual of the society has a right to be protected by it in the enjoyment of his life, liberty and property according to standing laws. He is obliged, consequently, to contribute his share to the expense of this protection; to give his personal service, or an equivalent when necessary: but no part of the property of any individual can, with justice, be taken from him, or applied to public uses, without his own consent, or that of the representative body of the people. In fine, the people of this commonwealth are not controllable by any other laws than those to which their constitutional representative body have given their consent. And whenever the public exigencies require that the

Morton and Samuel Wilde, held that plaintiffs had no exclusive right to tolls from every traveler over the line of travel between Charlestown and Boston, and therefore the Warren Bridge charter did not take any property belonging to them, nor did it impair any contractual obligation running to them from the Commonwealth.[60]

Plaintiffs then filed a writ of error with the United States Supreme Court, seeking review under the Contracts Clause of the United States Constitution.[61] Much of the argument was framed in terms of the Whig jurisprudence of vested rights.[62] The four eminent advocates, Daniel Webster and Warren Dutton for the Charles River Bridge Proprietors, and Simon Greenleaf and John Davis for the Warren Bridge Proprietors, debated the history and legal characteristics of the ferry franchise that had been displaced by the Charles River Bridge.[63] They contended mightily over the contemporary consequences of the fact that the charter of the first bridge required its owners to pay an annuity to Harvard College, the displaced beneficiary of the ferry franchise. They dissected the terms of the bridge charter issued in 1785, and the meaning of the extension granted in 1792. They delved deeply into ancient English precedent to divine the rule of construction properly applicable to the charter, and they clashed over contemporary policy implications of the different rules offered as choices. The courtroom rang with the terms of the law governing corporeal and incorporeal hereditaments,[64] grants by

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property of an individual shall be appropriated to public uses, he shall receive a reasonable compensation therefor.

MASS. CONST., Declaration of Rights, art. X.

60. *Charles River Bridge*, 24 Mass. (7 Pick.) at 463-64, 477.

61. *The Charles River Bridge Case*, 36 U.S. (11 Pet.) at 538.

62. By "the Whig jurisprudence of vested rights" I mean the view that the most important purpose of law was to protect individual property rights from the depredations of the democratic majority. Jennifer Nedelsky attributes the origin of this doctrine in American constitutional jurisprudence primarily to James Madison. JENNIFER NEDELSKY, PRIVATE PROPERTY AND THE LIMITS OF AMERICAN CONSTITUTIONALISM (1990); Jennifer Nedelsky, *The Protection of Property in the Origins and Development of the Constitution*, *in* TO FORM A MORE PERFECT UNION: THE CRITICAL IDEAS OF THE CONSTITUTION 38-72 (Herman Belz et al. eds., 1992). The heirs of Madison's Federalism in the 1830s were the Whigs, the party with which Story, Kent, Marshall, and Bushrod Washington identified. Nedelsky, *in* TO FORM A MORE PERFECT UNION, at 38-72.

63. The arguments of the four advocates are set forth in *The Charles River Bridge Case*, 36 U.S. (11 Pet.) at 428-536.

64. According to Black's Law Dictionary, "[a]t common law corporeal hereditaments were physical objects, comprehended under the term land, and were said to lie in livery, while incorporeal hereditaments existed only in contemplation of law, were said to lie in grant and were affiliated with chattel interests." BLACK'S LAW DICTIONARY 726 (6th ed. 1990). Franchise rights, such as those claimed by the

the Crown and others, and common law rules of contract construction.[65] The debate was framed largely in terms chosen and imposed upon the law of the early republic by Chief Justice Marshall, and Justices Washington and Story.[66]

In his first opinion as Chief Justice, Taney ruled that the chartering and construction of the new bridge did not violate the Contracts Clause of the United States Constitution.[67] In analyzing Taney's opinion, historians have focused their attention largely on the last portion, which purports to set forth a catalogue of undesirable consequences which would follow from the adoption of the position advocated by the plaintiffs and by Justice Story. The prevailing view is that Taney's primary motivation was to avoid these anti-developmental consequences. Taney is thought to have feared that turnpike corporations would claim exclusive rights in a line of travel between two points, and then hold progress, in the form of railroads serving the same line of travel, hostage to whatever extortionate demands the turnpikes might make.[68] Historians have read the famous dictum as evidence that Taney believed that a victory for the Charles River Bridge Proprietors would throw the economy "back to the improvements of the last century,"[69] and that his belief was prophetic.[70]

Justice Story's dissent was framed in the discourse of vested rights. He insisted that the charter of the first bridge was a contract between the Charles River Bridge Proprietors and the state, which created by necessary implication the exclusive rights that the Proprietors asserted.[71] Historians have implicitly taken the position that Story's understanding of prior law was correct, and that Taney's understanding of its consequences was also correct.[72] In other words, historians have assumed that the plaintiffs' rights were in fact vested, and that the protection of those rights would stifle the development of transportation facilities, and hence, economic growth. In their view, Taney's opinion changed the law in a manner intended to promote economic development.[73]

Charles River Bridge Proprietors, were incorporeal hereditaments.

65. *The Charles River Bridge Case*, 36 U.S. (11 Pet.) at 428-536.

66. Newmyer, cited at note 5, at 154.

67. *The Charles River Bridge Case*, 36 U.S. (11 Pet.) at 552.

68. KUTLER, cited at note 7, at 93.

69. *The Charles River Bridge Case*, 36 U.S. (11 Pet.) at 553.

70. HURST, cited at note 29, at 28; KUTLER, cited at note 7, at 93-95.

71. *The Charles River Bridge Case*, 36 U.S. (11 Pet.) at 598 (Story, J., dissenting).

72. *See, e.g.*, HURST, cited at note 29, at 28; KUTLER, cited at note 7, at 93-101.

73. See text accompanying notes 34-44.

This selective appropriation of portions of the majority and dissenting opinions provided historians with their ideas of both "privilege" and the creativity of the destruction of that privilege. It was an understandable error for historians who were still heavily, though indirectly, influenced by Justice Story, and also deeply beholden to Willard Hurst for their paradigm of nineteenth century legal history.[74] Their uncritical acceptance of Taney's dire hypothetical was both an act of filial piety, and an act of creation of a critical historical discontinuity in which the future was shaped.

Hurst himself characterized the case as "[t]he classic statement of policy in favor of freedom for creative change as against unyielding protection for existing commitments."[75] For Henry F. Graff, the Charles River Bridge, and the controversy surrounding it, stood "as an indestructible monument to the dogged struggle between property rights and human needs."[76] According to R. Kent Newmyer, "[c]apitalism itself was at issue: what it meant and who would set economic policy."[77] Newmyer also argued that the case represented a clear choice between the stable protection of earlier investments, on one hand, and the facilitation of later investments, on the other.[78]

In a somewhat more lengthy discussion, Morton Horwitz described *The Charles River Bridge Case* as "the last great contest in America between two different models of economic development," the one based on monopoly, the other based on competition.[79] He has argued that Taney's opinion reflected a broad consensus in opposition to monopoly privilege, a consensus "no lon-

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74. Newmyer, cited at note 5, at 154 (arguing that Story's jurisprudence and the tradition he established at Harvard Law School formed the basis of both the conservative legal tradition of the Gilded Age and the scholarly tradition in American law). This tradition continues to influence the writing of legal history. HURST, cited at note 29; *see* Stephen Diamond, *Legal Realism and Historical Method: J. Willard Hurst and American Legal History*, 77 MICH. L. REV. 784 (1979); David H. Flaherty, *An Approach to American History: Willard Hurst as Legal Historian*, 14 AM. J. LEGAL HIST. 222 (1970); John P. Frank, *American Legal History: The Hurst Approach*, 18 J. LEGAL EDUC. 395 (1966); Robert W. Gordon, *J. Willard Hurst and the Common Law Tradition in American Legal Historiography*, 10 LAW & SOC. REV. 9 (1975); Harry N. Scheiber, *At the Borderland of Law and Economic History: The Contributions of Willard Hurst*, 75 AM. HIST. REV. 744 (1970).

75. HURST, cited at note 29, at 27.

76. Graff, cited at note 41, at 71, 85.

77. NEWMYER, cited at note 4, at 225; *see also* R. Kent Newmyer, *Justice Joseph Story, The Charles River Bridge Case and the Crisis of Republicanism*, 17 AM. J. LEGAL HIST. 232-45 (1973).

78. NEWMYER, cited at note 23, at 109.

79. HORWITZ, cited at note 49, at 134.

ger confined to a portion of the political spectrum,"[80] which included even the retired Chancellor Kent.[81] All of this is in accord with Stanley Kutler's argument that *The Charles River Bridge Case* "fashioned a legal doctrine to justify the process of creative destruction – a continuous process whereby new inventions and enterprises create new goods and services, and . . . destroy existing ones, all under the often empty banner of progress, improvement, and need."[82]

ANALYSIS OF THE PREVAILING VIEW

Following Taney's dictum, all of these historians framed the issue in *The Charles River Bridge Case* as a stark choice between stagnation and development. On close examination, however, many of the premises on which this understanding is based must be rejected as insupportable. As a matter of fact, *The Charles River Bridge Case* was not typical of the legal and economic choices commonly faced by American society in the Jacksonian era, and the rule advocated by Webster and Story would not have thrown the country "back to the improvements of the last century."[83]

My conclusion is based largely upon three crucial facts, which have previously received insufficient attention. First, historians have not given adequate consideration to an important issue of legal process in *The Charles River Bridge Case.* The United States Supreme Court was and remains a court of limited jurisdiction, and did not have the entire controversy of *The Charles River Bridge Case* before it. Under its own interpretation of section 25 of the Judiciary Act of 1789[84] the Court was foreclosed

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80. *Id.* at 138.

81. In fact, Kent viewed the result in *The Charles River Bridge Case* with "disgust." See text accompanying note 25.

82. KUTLER, cited at note 7, at 160.

83. *The Charles River Bridge Case,* 36 U.S. (11 Pet.) at 553.

84. Section 25 of the Judiciary Act of 1789 provided:

> *And be it further enacted,* That a final judgment or decree in any suit, in the highest court of law or equity of a State in which a decision in the suit could be had . . . where is drawn in question the validity of a statute of, or an authority exercised under any State, on the ground of their being repugnant to the constitution, treaties or laws of the United States, and the decision is in favour of such their validity . . . may be re-examined and reversed or affirmed in the Supreme Court of the United States upon a writ of error . . . . But no other error shall be assigned . . . as a ground of reversal . . . than such as appears on the face of the record, and immediately respects the before mentioned questions of validity or construction of the said constitution, treaties, statutes, commissions, or authorities in dispute.

1 Stat. 85-87 (1789).

from any consideration of the issue of eminent domain.[85] The stark choice between privilege and creative destruction depends upon the absence of a middle ground. That middle ground was available in the doctrine of eminent domain, which, though excluded from the Supreme Court's jurisdiction, was very much available to state courts and legislatures. The sharp dilemma the Court faced was a consequence of its own jurisdictional limitations. It did not reflect any correspondingly sharp choice in the realm of Jacksonian political economy.

Beyond this historical effect, the Court's limited jurisdiction had a significant historiographical effect. It structured the case as a Manichean choice, and gave historians both a critical moment in time to study, and a way of explaining the widespread anxiety that the decision seemed to cause. The significance of the jurisdictional rule has escaped attention in part because practical aspects of the doctrine of eminent domain have been misunderstood. This misunderstanding is perhaps a result of the mistaken assumption that the cost of compensation in *The Charles River Bridge Case* was somehow representative of compensation costs in a broad range of cases. In fact, the enormous value of the Charles River Bridge franchise was wildly aberrational, and did not reflect the low value of other transportation franchises before the great railroads.[86] This fact alone should raise skepticism about any effort to construct *The Charles River Bridge Case* as an epitome of Jacksonian economic conflict.

Secondly, even those historians who have mentioned compensation in their discussions of the case have dismissed it as costly and impractical, and inconsistent with the law's assumed pro-developmental instrumentalism.[87] This position is unsound because it is based upon a serious overestimation of the practical costs of compensation. In fact, "the improvements of the last century," as Taney described the turnpikes, were largely worthless as property and abandoned as business enterprises by the time of the Supreme Court's decision.[88] Because they were nearly worthless, the old turnpike corporations would have had a claim to only minimal compensation. Moreover, many had been abandoned and had lost their corporate privileges, including the

85. *The Charles River Bridge Case*, 36 U.S. (11 Pet.) at 519-20; *see also* Watson v. Mercer, 33 U.S. (8 Pet.) 88 (1834); Barron v. Mayor of Baltimore, 32 U.S. (7 Pet.) 243 (1833); Satterlee v. Mathewson, 27 U.S. (2 Pet.) 380, 413 (1829); Meade v. Beale, 16 F. Cas. 1283 (C.C.D. Md. 1850) (No. 9371) (Taney, C.J.); Golden v. Prince, 10 F. Cas. 542 (C.C.D. Va. 1814) (No. 5509) (Washington, J.).

86. See text accompanying notes 121-32.

87. *See, e.g.*, KUTLER, cited at note 7, at 101.

88. *The Charles River Bridge Case*, 36 U.S. (11 Pet.) at 553.

right to sue and be sued as corporations.[89] Despite the dire alternative set out in the Chief Justice's dictum, the turnpikes were not in any state of slumber from which they could be awakened. They were dead. Even if they could have been revived, their only viable claim would have been for compensation under state law. In nearly all cases, these claims would have imposed only a minimal cost.

The third point, which is very closely related to the first two, arises from the fact that the enormous profits made by the Charles River Bridge Proprietors were highly unusual. As noted, the vast majority of transportation franchises, especially turnpikes and canals, were unprofitable, or, at best, minimally profitable.[90] As a result, they were not perceived as redistributions of wealth worthy of Jacksonian wrath. In fact, contemporaries recognized that they provided important benefits to the public, but little benefit to their owners.[91] The exceptionally profitable bridge, recognized initially as a public benefit,[92] came to be perceived as a tax upon the public, and a tribute exacted from an increasingly incensed community.[93]

The Court's Jurisdictional Limitations

Compensation for the Charles River Bridge Proprietors, under the doctrine of eminent domain, escaped careful discussion in the Court's majority opinion because the majority was unwilling to extend the Court's jurisdiction to include it.[94] In his argument on behalf of the Charles River Bridge, Warren Dutton explicitly contended that the Contracts Clause was violated when the state destroyed the franchise without compensation.[95] In effect, he argued in favor of incorporation of the compensation clause of the state bill of rights into the federal Contracts Clause.[96] He ar-

89. *See* Hooker v. Utica & Minden Turnpike Rd. Co., 12 Wend. 371 (N.Y. Sup. Ct. 1834).

90. See text accompanying notes 121-32.

91. See note 124 and accompanying text.

92. See the original charter of the Charles River Bridge, 1784 Mass. Acts 53.

93. See the arguments of John Davis, on behalf of the Warren Bridge Proprietors, *The Charles River Bridge Case*, 36 U.S. (11 Pet.) at 474-513, and text accompanying notes 150-61.

94. *The Charles River Bridge Case*, 36 U.S. (11 Pet.) at 429, 471, 509-11.

95. *Id.* at 457.

96. Dutton did not argue that the state's action violated the takings clause of the Fifth Amendment to the federal constitution. That argument had already been foreclosed. *See* Barron v. Mayor of Baltimore, 32 U.S. (7 Pet.) 243 (1833). In *Barron*, the Court had explicitly rejected the argument that the federal bill of rights, and the Fifth Amendment in particular, could be applied to invalidate an uncompensated taking by a state government. *Barron*, 32 U.S. (7 Pet.) at 250-51. Chief Justice Mar-

gued as follows:

> If property held under a grant from the State is taken, in the exercise of the eminent domain, provision for compensation is always made in the act, and in such cases no questions can arise; as the property is taken by a paramount authority, and paid for. But, if property thus held is taken, and no compensation is provided, it does give this court jurisdiction; because this grant is declared to be a contract executed; the rights of the grantor are said to be forever extinguished, and a covenant implied never to re-assert them. When, therefore, this property thus held is resumed or destroyed by the grantor, the obligation of the contract is impaired, the implied covenant is broken, and the jurisdiction of this court attaches.[97]

Daniel Webster made a similar argument, denying the Court's jurisdiction over eminent domain, but making compensation a crucial element of his Contracts Clause analysis.[98] Webster stated, on the one hand, "[i]t is admitted [by plaintiffs] that if the legislature of Massachusetts takes private property for public use, under the power of eminent domain, this court cannot take cognisance of the case."[99] On the other hand, Webster stated:

> The plaintiffs say the act for the erection of Warren Bridge violates the Constitution of the United States, and that the act takes the property of the plaintiffs for public use, without making compensation for it. They rest on their charter.
>
> . . . .
>
> This presents the question, whether the Constitution of the United States is violated. There is no other issue made on this record.[100]

Simon Greenleaf, on behalf of the Warren Bridge Proprietors, argued that the issue was one of the sovereign honor of the Commonwealth of Massachusetts. Conceding that relief would be appropriate in the event of a genuine impairment of contract, he nevertheless insisted that the Supreme Court must otherwise presume that the state would "pursue, towards its own citizens, an enlightened and liberal policy."[101] Absent an impairment of

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shall held that the federal constitution applied solely to the federal government, except insofar as it explicitly applied to the states. *Id.* at 251. The Fifth Amendment by its terms did not apply to the states, and, consequently, the Court held that the amendment conferred no federal jurisdiction over the claim for compensation in that case. *Id.*

97. *The Charles River Bridge Case*, 36 U.S. (11 Pet.) at 457. See Dutton's summary and conclusion to the same effect. *Id.* at 461.

98. *Id.* at 519-20. Webster's arguments are imperfectly preserved because he failed to provide the reporter of decisions with a text or notes of his argument. What is set forth in the reported case is the reporter's reconstruction, from his own notes and memory, of Webster's argument. *Id.* at 514.

99. *Id.* at 520.

100. *Id.* at 519.

101. *Id.* at 473.

contract, the Court could inquire no further.[102] John Davis, also counsel for the Warren Bridge Proprietors, raised a more forward-looking concern. He argued that adoption of the plaintiffs' position on jurisdiction would open the door to so great an expansion of the Court's jurisdiction as would "make this court preside over the constitution and laws of the States as well as those of the United States."[103]

Chief Justice Taney made it clear early in his opinion that he had no inclination to accept the novel incorporationist doctrine advocated by Dutton and Webster.[104] Instead, he finessed Webster's argument and adhered closely to existing jurisdictional doctrine:

> It is very clear that in the form in which this case comes before us — being a writ of error to a State court — the plaintiffs in claiming under either of these rights [the ancient ferry or the bridge charter] must place themselves on the ground of contract, and cannot support themselves upon the principle that the law [the Warren Bridge charter] divests vested rights.[105]

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102. In raising this argument, Greenleaf was gesturing toward a longstanding policy, reflected in the actions of the legislatures of many states, of providing compensation for the effects of state action even when no positive law compelled compensation. The most prominent example of this arose from *The Charles River Bridge Case* itself. See note 134.

103. *The Charles River Bridge Case*, 36 U.S. (11 Pet.) at 511. In a separate opinion concurring in the result, Justice McLean relied heavily upon this reasoning in holding that the Supreme Court lacked jurisdiction over the issue of compensation, and that it could not be incorporated into the Contracts Clause. *Id.* at 554-83 (McLean, J., concurring). Such a rule "would carve out for this court a new jurisdiction, not contemplated by the constitution, and which cannot be safely exercised." *Id.* at 583.

104. *Id.* at 539.

105. *Id.* at 539. Taney relied primarily upon Justice Washington's opinion in *Satterlee v. Mathewson*. *Id.* (citing Satterlee v. Mathewson, 27 U.S. (2 Pet.) 380 (1829)). In that case, Satterlee claimed that he had been divested of rights in real property by a statute adopted by the Pennsylvania legislature. *Satterlee*, 27 U.S. (2 Pet.) at 411. After holding that the statute did not impair any contractual obligation, the Court held that it had no jurisdiction to inquire into state actions taken in violation of Satterlee's vested, but non-contractual, rights. *Id.* at 413. Absent a violation of the Contracts Clause, the Court was powerless:

> The only question which occurs in this cause, which it is competent to this Court to decide is, whether the statute . . . is . . . objectionable, on the ground of repugnancy to the Constitution of the United States?
>
> . . . .
>
> The objection however which was most pressed upon the Court . . . was, that the effect of this act was to divest rights which were vested by law in Satterlee. There is certainly no part of the Constitution of the United States which applies to a state law of this description; nor are we aware of any decision of this, or of any Circuit Court, which has condemned such a law upon this ground; provided its effect be not to impair the obligation of a contract . . . .
>
> . . . .

In essence, Taney and the Court accepted the proposition that compensation was solely a matter of state law. The question was not subject to further review under the prevailing construction of the Constitution and section 25 of the Judiciary Act of 1789. With the case in this procedural posture, only the claim based on the Contracts Clause, without the compensation issue, was within the Court's jurisdiction.[106]

The view that the federal court lacked jurisdiction over the compensation issue in *The Charles River Bridge Case* was also shared by Justice McLean, who stated in a separate opinion, "[b]elieving that this court has no jurisdiction in this case, although I am clear that the merits are on the side of the complainants, I am in favor of dismissing the bill for want of jurisdiction."[107] Only Justices Story and Thompson thought the Court should extend its jurisdiction by incorporating the compensation requirement into the Contracts Clause.[108]

Because the Court held that the Charles River Bridge charter did not create the rights claimed by the plaintiffs, its disposition of the jurisdictional issue was not essential to the outcome of the case. Its self-imposed jurisdictional limitation must therefore be recognized as serving purposes distinct from the Court's immediate concerns in *The Charles River Bridge Case*. In other words, the Court did not need to limit its jurisdiction in order to destroy the Charles River Bridge franchise. But the fact that it declined to expand its jurisdiction served to eliminate the issue of compensation from the case, and created the sharp choice between privilege and creative destruction that historians have mistaken as a

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> . . . We intend to decide no more than that the statute objected to in this case is not repugnant to the Constitution of the United States, and that unless it be so, this Court has no authority, under the twenty-fifth section of the judiciary act, to re-examine and to reverse the judgment of the Supreme Court of Pennsylvania in the present case.

Id. at 409, 413-14.

Perhaps intending to tweak Justice Story, Taney also relied on Story's opinion for the Court in *Watson v. Mercer*, in which the Supreme Court held that it had no jurisdiction to hear a case in which a party alleged that an uncompensated taking of real property, pursuant to a state statute, violated the federal constitution. *The Charles River Bridge Case*, 36 U.S. (11 Pet.) at 540 (quoting Watson v. Mercer, 33 U.S. (8 Pet.) 88 (1834)).

106. *See* BENJAMIN WRIGHT, THE CONTRACT CLAUSE OF THE CONSTITUTION 66-68 (1938) (noting that the issue of eminent domain was not squarely before the Court until 1848, in West River Bridge v. Dix, 47 U.S. (6 How.) 507 (1848)). In *West River Bridge*, the Court held that a compensated taking of property by a state, in conformance to its own laws, did not violate the Contracts Clause, Art. I, sec. 10 of the United States Constitution. *West River Bridge*, 47 U.S. (6 How.) at 536.

107. *The Charles River Bridge Case*, 36 U.S. (11 Pet.) at 583.

108. *Id.* at 638 (Story, J., dissenting). Here Story anticipated to some extent the rule articulated in *West River Bridge*.

reflection of the condition of Jacksonian political economy. By ignoring a fundamental issue of legal process — those rules that both empower and restrain the courts — historians have mistaken constitutional and jurisdictional limitations for cultural and economic conditions. The Court's jurisdictional limitations did not create or reflect the economic, social, or for that matter, legal choices faced by American society at that time. Compensation remained a live issue in the state courts, legislatures and local communities throughout the country.

Eminent Domain and the Measure of Compensation

By 1828, when the Warren Bridge was chartered, the law of virtually every state permitted expropriation of private property for public purposes, upon payment of compensation.[109] Harry Scheiber has summarized the basic constitutional concepts concerning eminent domain law, as adopted by the state courts, as follows:

> (1) that the eminent domain power was an inherent attribute of sovereignty, so that private property was held subject to takings by the state; (2) that this power could be legitimately exercised by the state only for a "public use" or "public purpose"; and (3) that when property was so taken, the injured private owner must be paid a "just" or "fair" compensation.[110]

Taney's famous dictum in *The Charles River Bridge Case* appeared to reflect two concerns: first, that superseded enterprises such as turnpikes would obtain injunctions completely and permanently barring the construction of new competing enterprises, and second, that even if turnpike interests could be bought off, the cost of such compensation would be enormous. Questions thus are raised concerning the relationship between the issuance of injunctions and the payment of compensation, and the actual

109. *See, e.g.*, Vanhorne v. Dorrance, 2 Dall. 303, 309 (C.C.D. Pa. 1795); Parks v. City of Boston, 32 Mass. 198 (1834); New Jersey R.R. & Transp. Co. v. Suydam, 17 N.J.L. 25 (N.J. 1839); Jackson v. Cory, 8 Johns. 385, 388 (N.Y. 1811); Jackson v. Catlin, 2 Johns. 248, 263 (N.Y. 1807); White River Turnpike Co. v. Vermont Central R.R., 21 Vt. 590 (1849); Armington v. Town of Barnet, 15 Vt. 745 (1843); JOHN LEWIS, A TREATISE ON THE LAW OF EMINENT DOMAIN IN THE UNITED STATES (1888); Joseph M. Cormack, *Legal Concepts in Cases of Eminent Domain*, 41 YALE L.J. 221 (1931); Arthur Lenhoff, *Development of the Concept of Eminent Domain*, 42 COLUM. L. REV. 596 (1942); Harry Scheiber, *Property Law, Expropriation, and Resource Allocation by Government: The United States, 1789-1910*, 33 J. ECON. HIST. 232 (1973); William B. Stoebuck, *A General Theory of Eminent Domain*, 47 WASH. L. REV. 553 (1972); Note, *The Origins and Original Significance of the Just Compensation Clause of the Fifth Amendment*, 94 YALE L.J. 694 (1985); Fisher, cited at note 44.

110. Scheiber, cited at note 74, at 235.

cost of compensation under the doctrine of eminent domain.[111]

The damages to be paid for a compensated taking were based upon the fair market value of the property, reduced by a sum intended to reflect the somewhat slippery notion that the property owner also benefitted from the condemning enterprise's activities. For example, in *Parks v. City of Boston*,[112] Chief Justice Shaw recognized the measure of damages as: (1) the value of the property at the time of the taking; plus (2) interest from that day until the day on which payment is made; plus (3) any damages beyond the value of the expropriated property, such as the diminution, if any, of the value of the plaintiff's remaining property; minus (4) the value of any benefit conferred upon the owner by virtue of the existence or operation of the condemning corporation.[113] The New Jersey Supreme Court of Judicature similarly defined value as present market value at the time of the expropriation, but noted that the evidence to be received on that issue must be broad, and include "a multitude of other facts that consistently with law and common sense, might influence the judgment."[114]

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111. There is ample evidence of the procedures followed in the various states in computing the amount of compensation under the doctrine of eminent domain. In most cases, corporate charters provided procedures for the exercise of the eminent domain power. Where the condemning corporation and the property owner failed to reach an agreement on the amount, the first step was to refer the dispute to arbitrators chosen by each side, or to a compensation commission established in accordance with the condemning corporation's charter. If either party was aggrieved by the decision of the arbitrators or commissioners, a jury could be assembled by the county court or sheriff. The jury would receive evidence from the parties, would in many cases inspect the property, and would make a *de novo* valuation of the property pursuant to instructions given by the sheriff or court. Jury awards were subject to limited judicial review, and could be amended or vacated only if patently unreasonable, or if the award was such that it could only have been made upon the application of unlawful or erroneous principles. Juries were explicitly authorized to measure the evidence of value in light of their own general knowledge and experience. *See, e.g.*, Patterson v. City of Boston, 37 Mass. 159 (1838); Parks v. City of Boston, 32 Mass. 198 (1834); New Jersey R.R. & Trans. Co. v. Suydam, 17 N.J.L. 25 (N.J. 1839); White River Turnpike v. Vermont Central R.R., 21 Vt. 590 (1849); Armington v. Town of Barnet, 15 Vt. 745 (1843); ISAAC F. REDFIELD, THE LAW OF RAILWAYS ch. XI (6th ed. 1888); Tony Freyer, *Reassessing the Impact of Eminent Domain in Early American Economic Development*, 1981 WIS. L. REV. 1263, 1267-78 (1981).

112. 32 Mass. 198 (1834).

113. *Parks*, 32 Mass. at 208-09.

114. *Suydam*, 17 N.J.L. at 48. One of the justices listed the important items of evidence:

> [A]ny pressing demand for building lots on account of their scarcity; the highest price at which actual sales have been made; sums that have been offered with a bona fide intent to purchase, though refused by the holders; the proximity of the land to buildings already erected, or to public works, or to the common marts of business; and a multitude of other facts that consistently

In the case of a complete taking of a corporate franchise such as a bridge, turnpike, or canal, the relevant measure of value appears to have been the fair market value of the outstanding shares of stock, reduced by some increment which, as a matter of common sense, would reflect the benefit conferred on the owner of the condemned property. Daniel Webster argued that the "property" at stake in *The Charles River Bridge Case* was, in effect, the stock in the franchise, which was, by the time of oral argument, "not worth thirty dollars."[115] The trading price of corporate shares would reflect the value of the franchise, including such factors as earnings, if any, capital investment, and the duration of the franchise in cases in which the charter limited corporate longevity. The benefit conferred by the condemnation would be determined on a case by case basis. Due to the Court's jurisdictional limitation, however, none of these factors was considered because value was not at issue in *The Charles River Bridge Case*.

The Cost of Compensation

In order to take seriously Chief Justice Taney's statement of the policy of expansion supposedly underlying the decision, we must establish the plausibility of the position that a contrary result would establish precedent that would enable "the improvements of the last century" to hold progress hostage to whatever extortionate demands they might care to make. In this *ad terrorem* scenario, the right of old turnpikes to enjoin the construction of competing railroads would be protected by the Contracts Clause of the federal Constitution. Justice Story recognized this as preposterous. Under his view, newer enterprises would simply be required to compensate older, superseded enterprises.[116]

Story has been criticized for underestimating the economic and social costs related to the policy of compensation advocated in his dissent. Stanley Kutler argues that, "Story simply discounted the potentially staggering social and economic costs to the community inherent in a universal application of eminent domain."[117] But the cost of eminent domain presents an empirical question, to which Kutler has assumed an answer. Perhaps his thinking has been too strongly influenced by the exorbitant profits enjoyed

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with law and common sense, might influence the judgment.

Id.

115. *The Charles River Bridge Case*, 36 U.S. (11 Pet.) at 518.
116. *Id.* at 638, 641-46 (Story, J., dissenting).
117. KUTLER, cited at note 7, at 101.

by the Charles River Bridge Proprietors, and the indisputably enormous cost of fair compensation for that particular property.[118] The exorbitant profits generated by the bridge franchise made fair compensation for its owners economically unfeasible, and politically impossible in an age in which such massive redistributions of wealth were seen as corrupt.[119] Chief Justice Parker of the Supreme Judicial Court recognized this political reality when he wrote, "I think the question of the necessity of indemnifying the proprietors of Charles River bridge has been prejudiced by the well known fact, that the profits of the bridge have been great beyond the example of any similar institution in this country."[120] Taney's dictum and Story's critics can only be correct if turnpike and canal franchises also had a substantial market value, based on profits. But economic historians have clearly demonstrated that this was not the case. In fact, the historical record points unambiguously to precisely the opposite conclusion.

Historians of the early turnpike movement have unanimously concluded that turnpikes, with very rare exceptions, were unprofitable. More importantly for the present analysis, their failure as investments and commercial enterprises was widely acknowledged by contemporary observers long before turnpikes were superseded by railroads.[121] Philip Taylor notes that there were two hundred thirty turnpikes in operation in New England during the first half of the nineteenth century, but only five or six returned a reasonable profit.[122] The vast majority of such enter-

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118. At the second oral argument before the United States Supreme Court, Mr. Davis, counsel for the defendants, reported that the value of the bridge and franchise was $500,000. *The Charles River Bridge Case*, 36 U.S. (11 Pet.) at 474. Daniel Webster estimated the value of the franchise to be $300,000. *Id.* at 518.

Henry F. Graff reports that the Charles River Bridge Proprietors valued the Charles River Bridge at $280,000 in the mid-1820s. Graff, cited at note 41, at 75. Morton Horwitz reports that the bridge generated approximately $30,000 per year in profits during the decade prior to the opening of the Warren Bridge. HORWITZ, cited at note 49. See the comments of Chief Justice Parker of the state court, in text accompanying note 120.

119. See EINHORN, cited at note 44, for a discussion of redistributions of wealth by government as a species of corruption.

120. *Charles River Bridge*, 24 Mass. (7 Pick.) at 532.

121. *See* JOSEPH A. DURRENBERGER, TURNPIKES: A STUDY OF THE TOLL ROAD MOVEMENT IN THE MIDDLE ATLANTIC STATES AND MARYLAND 112 (1931); J.L. RINGWALT, DEVELOPMENT OF TRANSPORTATION SYSTEMS IN THE UNITED STATES 30-32 (1988); GEORGE R. TAYLOR, THE TRANSPORTATION REVOLUTION, 1830-1860, 50-55 (1951); Daniel B. Klein, *The Voluntary Provision of Public Goods? The Turnpike Companies of Early America*, 28 ECON. INQUIRY 788 (1990); Daniel B. Klein & John Majewski, *Economy, Community, and Law: The Turnpike Movement in New York, 1797-1845*, 26 LAW & SOC'Y REV. 469 (1992); Philip E. Taylor, The Turnpike Era in New England, ch. V (1934) (unpublished Ph.D. dissertation, Yale University).

122. P. Taylor, cited at note 121, at 266.

prises faced significant difficulty in raising capital sufficient to allow them to commence operation. Many were chartered but never constructed.[123] Most turnpikes that actually commenced business generated toll revenues insufficient to pay for maintenance of the road. The very few which paid any dividends at all showed a comparatively poor rate of return.[124] An observer of the turnpike movement in Massachusetts wrote in 1830:

> The turnpikes, which were multiplied very rapidly a few years since in every part of the State, have frequently proved a convenience to the public; but to their projectors they have generally been unproductive and very frequently ruinous; the tolls gathered from the travellers being too inconsiderable to keep the roads in repair and refund to the owners their original cost.[125]

Investors were quick to recognize that turnpikes were unprofitable, and, consequently, the fair market value of shares of stock in turnpike corporations plummeted. By approximately 1830, turnpike stock was generally known to be worthless. Philip Taylor gives two telling examples of this trend:

> Shares of the Hartford and Dedham Turnpike sold originally [in 1804] for $50 per share. Within five years they brought but $10 per share, and by 1825 were worthless . . . . Original investors in Newburyport and Boston Turnpike stock paid, in 1803, $1000 per share. Eleven years later, two shares sold for $63 each. In 1831, a holding of fifty shares was sold for $525, or $10.50 per share. Ten years later, seven shares of the same stock brought $4, or $0.57 each.[126]

J. L. Ringwalt offers a similar statement made by a contemporary analyst of turnpike finances in Pennsylvania, who wrote in 1828 that:

> The whole surface of the State is traversed with numerous turnpikes,

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123. For example, in the decade 1801-1810, Massachusetts chartered 80 turnpikes, of which only 44 were built. *Id.* at app. I, at 339-40.

124. *Id.* at 107-08, 112-15. Philip Taylor's data suggests that, of those large turnpike corporations which managed to pay any dividends during the period of their operation, the average dividend was approximately 1.5%. *Id.* at 270-71 (Table XVII). Many other large turnpike corporations showed expenses in excess of toll receipts. *Id.* Smaller turnpikes did slightly better, according to estimates based on Taylor's data. *Id.* at 277 (Table XVIII). Of those small turnpikes on which he was able to obtain data, and which paid dividends, the average return was approximately 3.0%. *Id.* As with large turnpikes, many small roads paid no dividends, and collected tolls insufficient to cover expenses. *Id.* It should be noted that Taylor distinguished large turnpikes from small on the bases of length and capital investment. *Id.* at 269. He did not offer a specific formula to explain these categories further. *Id.*

125. *Id.* at 266 (quoting CARTER & BROOKS, GEOGRAPHY OF MASSACHUSETTS 186 (1830)).

126. P. Taylor, cited at note 121, at 273.

which extend their branches to the remotest districts. *None of them have yielded dividends sufficient to remunerate their proprietors.* Most of them have yielded little more than has been expended in their repairs, and some have yielded tolls not sufficient even for this purpose, and consequently, in some cases, have been abandoned by their proprietors . . . .[127]

In addition, Taylor's data show a high rate of turnpike abandonment, a trend which was unmistakable well before Taney wrote his opinion.[128]

Canals were similarly unprofitable. While a few, such as the Erie and the Delaware & Raritan, were phenomenally successful, most were dismal failures as investments. They returned little or no profit, and frequently required state subsidies in order to remain in operation.[129] Individual examples of financial failure abound.[130] All of the available evidence points to the conclusion that turnpikes and canals were generally not profitable enterprises, and that the fair market value of their stock dropped until many were virtually worthless. Many were abandoned, and consequently lost their corporate status, and with it, their capacity to sue.[131]

To the extent that fair market value was based on profits,

127. RINGWALT, cited at note 121, at 30-31 (quoting George W. Smith) (alteration in original). Both Ringwalt and Durrenberger concluded that turnpike investors were primarily motivated not by the promise of a return on their capital, but by the enhancement of commerce and real property values which typically accompanied the opening of new or more efficient lines of communication. *Id.*; DURRENBERGER, cited at note 121, at 104-05, 125-26. More recently, Daniel B. Klein has reached the same conclusion. *See* Klein, cited at note 121.

128. P. Taylor, cited at note 121, at app. VIII at 357-60. In Massachusetts, data is available for 88% of those chartered turnpikes which actually became operational. *Id.* Of these, 53% were either partially or completely abandoned before 1837. *Id.* In New Hampshire the data are unsatisfactory, but nevertheless indicate a high incidence of abandonment. *Id.* Connecticut and Rhode Island turnpikes fared somewhat better. *Id.*

129. *Id.* at 50-55.

130. The Middlesex Canal in Massachusetts returned dividends of approximately 0.8% in the decade 1819-1829. P. Taylor, cited at note 121, at 292-95. The Blackstone Canal, from Providence to the Massachusetts border, was even less successful. *Id.* The New Haven and Farmington Canal was a complete failure from the start, and was long dead before any competing railroad was built. *Id.* Harvey Segal's analysis of canal finances indicates that only those canals which attracted heavy volumes of traffic collected tolls sufficient to cover operating expenses and interest on capital invested. Harvey H. Segal, *Canals and Economic Development*, *in* CANALS AND AMERICAN ECONOMIC DEVELOPMENT 240-41 (Carter Goodrich ed., 1961). The number of canals which reached this pinnacle of success was quite small. *Id.* According to Segal's analysis, most canals, judged by these financial criteria, were failures. *Id.*

131. *See, e.g.*, Hooker v. Utica & Minden Turnpike Rd. Co., 12 Wend. 371 (N.Y. Sup. Ct. 1834) (holding that a turnpike corporation that had abandoned its road thereby lost its right to sue).

damages for takings of most turnpikes and canals would have amounted to little or nothing. The social and economic costs of eminent domain proceedings would not have been "staggering," as Kutler characterized them,[132] but would have been quite manageable, and in most cases minimal. Furthermore, it could not be expected that these defunct corporations, having lost their capacity to sue, would suddenly be revived to vex the railroads, absent a change in the law of abandonment intended to permit them to do so.

It may be argued, as Morton Horwitz has suggested, that compensation procedures and standards were themselves biased in favor of new enterprises, and regularly led to unrealistically low compensation awards.[133] This was certainly true in some cases, most especially *The Charles River Bridge Case* itself.[134] But that fact is insufficient to rehabilitate the prevailing view of *The Charles River Bridge Case* and its relation to Jacksonian political economy. More importantly, as Tony Freyer's careful study of compensation proceedings in Maryland and the Middle Atlantic states demonstrates, such proceedings frequently led to anti-

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132. KUTLER, cited at note 7, at 101.

133. HORWITZ, cited at note 49, at 63-70.

134. In the case of the Charles River Bridge, the Massachusetts legislature compensated the Charles River Bridge Proprietors. *See* KUTLER, cited at note 7, at 115 (noting that, in March, 1841, the legislature offered $25,000 for the old bridge and franchise). Kutler explains that "[t]he $25,000 did not represent payment for past damages; instead it merely constituted the state's purchase of the proprietors' rights to maintain a bridge for the remaining years of their charter." *Id.* But maintenance of the bridge was not a right, it was a burden imposed by law. In fact, the Charles River Bridge Proprietors were indictable for failure to maintain the bridge, tolls or no tolls. *The Charles River Bridge Case*, 36 U.S. (11 Pet.) 420, 639-40 (1837) (Story, J., dissenting); *see also* Kane v. People, 3 Wend. 363 (N.Y. Sup. Ct. 1829); State v. Day, 3 Vt. 138 (1830). The bridge was, therefore, a continuing burden on the Charles River Bridge Proprietors, from which they might eventually seek relief, not an asset they would seek to preserve. After the decision of the United States Supreme Court, the Charles River Bridge Proprietors had nothing to sell. Even if they did have something to sell, there was no reason for the Commonwealth to go to any expense to buy it. The traffic between Boston and Charlestown was not so heavy in 1841 as to require two bridges. The legislature could have waited until the Charles River Bridge Proprietors chose to abandon the old bridge, and could then have claimed it by default. The $25,000 payment was not a payment for a voluntary sale. In fact, it was a compensation, however low, for all of the Charles River Bridge Proprietors' losses.

There is evidence of similar payments even to unsuccessful turnpike corporations, in a few cases, upon surrender of the road to state or local governments. P. Taylor, cited at note 121, at 324, 357-60. In Massachusetts, the Braintree and Weymouth Turnpike, constructed at a cost of $38,250, brought $250 for its surrender in 1854. *Id.* The Hartford and Dedham, built for $32,030, brought $190 in 1838. *Id.* In Connecticut, the Shetucket Turnpike, built for $11,000, brought $1,375 in 1861. *Id.* The Derby, one of the few truly successful turnpikes, was constructed at a cost of $7,520, and brought $8,000 when it was finally abandoned in 1895. *Id.*

developmental results.[135] Compensation for valuable properties was occasionally assessed at sums beyond the means of the new entrepreneurs, effectively preventing the new enterprise from commencing operation. All of this suggests that the paradigm of conflict between absolute privilege and complete destruction fails to account for two levels of complexity. The first is simply the availability of compensation under eminent domain, and the economic evidence indicating that compensation costs would, at least in theory, be low. The second is the highly localized political determinants of compensation awards, which suggest the difficulty, and perhaps even the futility of generalization. What is certain is that the prevailing understanding of the case as a clear and sharp economic choice is unsatisfactory.

What, then, of Taney's famous dictum? Was it a prophecy of what would have happened had Story's rule prevailed, as many historians have thought? Probably not. As the discussion above suggests, the premises are so far from correct, and the speculations so extravagant, that it must be presumed, contrary to historians' previous belief, that Taney knew better. He must have known that turnpike franchises were unprofitable, and that their failure as business enterprises was independent of the establishment of railroads. He must have known that, as a result of the wholesale abandonment of unprofitable turnpikes and canals, their corporate franchises were lost, and with them, their right to sue. He certainly knew that, even if the Court should choose to protect implied rights, as contended for by Webster and Story, progress would not be halted, but that states would be forced to pay compensation for the destruction of those rights, under well settled principles of state law not properly before the Court in *The Charles River Bridge Case*. His apparent assertions to the contrary could not have been the basis for his decision, and longstanding assumptions based upon a literal reading of the dictum must now be rejected as insupportable. The combined extravagance and inaccuracy of the assertions suggest at least the possibility that Taney intended them as a sort of caricature, or *reductio ad absurdum*.[136]

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135. Freyer, cited at note 111, at 1266.

136. Taney had used this rhetorical gambit before. In *Brown v. Maryland*, he argued that his adversary's interpretation of the second clause of Article I, section 10 of the Constitution ("No State shall, without the Consent of Congress, lay any Imposts or Duties on Imports") would strip the states of all power to regulate the disposition or sale of imported goods even after their arrival in this country, and would create a situation in which the importer, immune from all state regulation, "may offer for sale large quantities of gunpowder in the heart of a city, and thus endanger the lives of the citizens; he may offer hides, fish, and articles of that de-

THE RISE OF JACKSONIAN JURISPRUDENCE

The understanding of Jacksonian jurisprudence as purely instrumental and developmental has come under attack recently by young historians who have begun sketching the outlines of a coherent common law jurisprudence, neither instrumental nor developmental in its essence.[137] These historians assert that common law jurisprudence was based on a notion of an organic community which was itself a bearer of rights. This notion was captured in the aphorism *salus populi suprema lex est*, the welfare of the people is the supreme law.[138]

As William Novak has recently shown, the "police power"[139] of the states and local communities, left largely unrestricted by the federal constitution under the Tenth Amendment, provided a basis for the regulation, and even the destruction of individual rights, when necessary to the interest of the public. In many respects this power was plenary, and did not require compensation as a condition of its legitimacy.[140] The police power had deep roots in traditional common law notions of community rights and their superior relationship to individual rights. In Novak's view, the common law was essentially a public law, based upon solicitude for the good of the whole, and drawn from a British and European tradition which pre-dated Lockean individualism and its embodiment in American constitutional law.[141] It found its practical expression in the broad range of laws enacted to govern such ordinary activities as the use of streets, wharves, navigable waterways, trades, the sale of food, the hours of labor, and the safety of workers.[142] Novak's work suggests the pervasive involvement of the community in all as-

scription, in places offensive and inconvenient to the public, and dangerous to the health of the citizens." Brown v. Maryland, 25 U.S. (12 Wheat.) 419, 427-28 (1827). The Court fended off Taney's argument by simply denying that such dire consequences would follow from adoption of his adversaries' position. *Brown*, 25 U.S. (12 Wheat.) at 444; *see* Novak, cited at note 44, at 361.

This method of argument appeared elsewhere in *The Charles River Bridge Case*. In his opinion concurring in the result, Justice McLean based a portion of his argument on this absurd premise, "[s]uppose the Legislature had authorized the construction of an impassable wall, which encircled the ends of the bridge, so as to prevent passengers from crossing on it." *The Charles River Bridge Case*, 36 U.S. (11 Pet.) at 565 (McLean, J., concurring).

137. See note 44.

138. Novak, cited at note 44, at 1-101.

139. Novak is careful to point out that he uses this term in its eighteenth century sense, borrowing from Blackstone, and defining the term as "the due regulation and domestic order of the kingdom." *Id.* at 5.

140. *Id.* at 5-6.

141. *See* Novak, cited at note 44.

142. *Id.* at 6-7 (listing many more examples).

pects of individual activity, and a conception of the community as an entity with a distinct nature and certain rights and prerogatives. The community as entity was represented by, and to some extent embodied in the government, especially the legislature. Together, these formed the *res publica*, the public thing.[143]

Salus populi, as an expression of fundamental notions of community rights, had its counterpart in the aphorism *sic utere tuo ut alienum non laedus*, use your own so as not to injure another. Where *salus populi* captured the superior prerogative of the community over the individual, *sic utere* expressed the individual's obligation to other individuals.[144] These concerns converged in a strongly felt need to abolish the monopolistic privileges of the economic elite, and to construct a government that would scrupulously avoid redistributions of wealth, especially redistributions upward.[145]

Together, the distinct but related ideas of community interest and the avoidance of redistributions of wealth upward served as a counterweight to the rigid Whig conception of property throughout the antebellum period.[146] The uncovering of these elements of the American legal tradition has forced historians to recognize that property was not always as effectively protected in antebellum law as had previously been thought, and that there was a powerful alternative to the tradition of possessive individualism.[147]

These two key concepts, that the community has rights and that government facilitated redistributions of wealth upward are illegitimate, both appear prominently in *The Charles River Bridge Case*. A portion of Taney's opinion relies very heavily upon the idea of community rights and the related idea of legislative discretion.[148] In the arguments offered on behalf of the

143. *Id.* at 130.

144. *Id.* at 8.

145. EINHORN, cited at note 44. This anti-redistributive impulse was embodied in the Massachusetts Declaration of Rights, Article 6, which provided, in relevant part, "[n]o man, nor corporation, or association of men, have any other title to obtain advantages, or particular and exclusive privileges, distinct from those of the community, than what arises from the consideration of services rendered to the public." MASS. CONST., Declaration of Rights, art. VI; *see also Charles River Bridge*, 24 Mass. (7 Pick.) at 358-59.

146. Fisher, cited at note 44. *Compare* William W. Fisher III, *Making Sense of Madison: Nedelsky on Private Property* 18 LAW & SOC. INQUIRY 547 (1993) (reviewing NEDELSKY, cited at note 62) *with* NEDELSKY, cited at note 62.

147. C.B. MACPHERSON, THE POLITICAL THEORY OF POSSESSIVE INDIVIDUALISM (1960); Fisher, cited at note 44.

148. *The Charles River Bridge Case*, 36 U.S. (11 Pet.) at 548-50. Many of the historians who have concurred in the prevailing view of the case have noted the rhetoric of community rights in the arguments and opinion. But they have mini-

Warren Bridge, there is a strong anti-redistributive justification for the new bridge's existence.[149] The presence of these ideas in the argument and opinion, together with the result, suggest that a distinctly Jacksonian jurisprudence of community rights was beginning to infiltrate the formerly Whig bastion of the constitutional law, and to challenge the hegemony of Marshall's and Story's views.

The language of community rights and anti-redistributive jurisprudence peppered the argument of Massachusetts Senator John Davis, counsel for the Warren Bridge Proprietors and a Whig.[150] After a brief introduction, he described the enormous scale of the redistribution of wealth wrought by the Charles River Bridge:

> The value of the property on the part of the plaintiffs has been stated here to be five hundred thousand dollars. Their bridge, costing originally about forty-six thousand dollars, has grown into this importance from the large annual income, having yielded to the proprietors, as the plaintiffs state, over twelve hundred thousand dollars, and advanced from one hundred pounds a share, to two thousand dollars.[151]

This portion of his argument was starkly Jacksonian. The case presented a conflict "of privilege against public right,"[152] between the beneficiaries of this enormous redistribution of wealth, on the one hand, and the public, "complaining that they are the tributaries to this great stock of private wealth," on the other.[153] And the issue was not one of vested rights, but of legislative and community sufferance. The Charles River Bridge Proprietors "have been suffered to go on until they have been remunerated in a most princely manner;"[154] they have been "not only re-imbursed, but enriched in a manner surpassing all ordinary acquisitions."[155]

The remainder of his argument addressed the issues with which his adversaries and co-counsel had been concerned. Yet he returned from time to time to the issue of redistribution. He characterized the rate at which tolls were taken by the Charles

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mized its importance, even to the point of reducing it to a rhetorical ornament. *See, e.g.*, KUTLER, cited at note 7, at 90-93; NEWMYER, cited at note 4, at 224-26. The novelty of my argument is my suggestion that the famous dictum concerning railroads was the rhetorical ornament.

149. *The Charles River Bridge Case*, 36 U.S. (11 Pet.) at 474-514.
150. KUTLER, cited at note 7, at 76.
151. *The Charles River Bridge Case*, 36 U.S. (11 Pet.) at 474.
152. *Id.* at 489-90.
153. *Id.* at 475.
154. *Id.* at 494.
155. *Id.* at 499.

River Bridge as "so liberal, not to say extravagant, that for an outlay of forty-six thousand dollars, the plaintiffs have received a return of over one million two hundred thousand dollars . . . . [This return has] been paid by a tax upon the public travel."[156] Senator Davis rejected the argument that the individual shareholders suffered by the loss of their interest, noting that they had "made a vast deal of money" and that "they have reaped too rich harvests to be great sufferers."[157] He reduced his adversaries' position to this: that the public shall "pay tribute perpetually; not to indemnify for the enterprise, but to add to the mass of wealth already accumulated."[158]

His use of the word "indemnify" is significant here. It suggests that the tolls were conceptualized not as a guarantee or a property right, but that they were simply the means by which the legislature attempted to ensure that public gain would not inflict private loss. An acceptable indemnity would return the proprietors' investment, with a small profit. The creation of a mass of wealth was neither intended nor acceptable. In the case of the Charles River Bridge, the government had, in effect, provided the Charles River Bridge Proprietors with far more than an indemnity. The return on their investment had crossed some vague threshold and become a tax upon the public travel. What had originally been conceived as a public benefit had become primarily a source of revenue for a private corporation, a tax, and an unjustified tribute assessed against the public interest.[159]

Davis was careful, at the end of his argument, to distance himself from the worst caricature of democracy run amuck. He professed to be "sincerely anxious for the preservation" of rights of property.[160] "I am not, therefore, for laying rude hands upon them — I am not for tearing away these great barriers of right. I wish it, therefore, to be distinctly understood that I place our case within the pale of the law, and invoke no violence in its aid."[161]

The Court's opinion in *The Charles River Bridge Case* appears to occupy a liminal position between Story's jurisprudence and

156. *The Charles River Bridge Case*, 36 U.S. (11 Pet.) at 491.

157. *Id.* at 498.

158. *Id.* at 499.

159. *Id.*

160. *Id.* at 514.

161. *The Charles River Bridge Case*, 36 U.S. (11 Pet.) at 514. Compare Justice Story's exasperated assertion, "[m]y judgment is formed upon the terms of the grant, its nature and objects, its design and duties; and, in its interpretation, I seek for no new principles, but I apply such as are as old as the very rudiments of the common law." *Id.* at 647 (Story, J., dissenting).

the newly recovered Jacksonian jurisprudence. The questions before the Court were framed largely in the discourse of Whig jurisprudence, and concerned the vesting and scope of the rights of the Charles River Bridge Proprietors. Yet the result of the case advanced the goals of Jacksonian jurisprudence, reversing a prominent upward redistribution of wealth, channeling resources back into the larger community, and vindicating community rights.

Contrary to the prevailing view that the heart of the opinion is the last portion, which makes reference to the railroads, I believe that the middle portion of the opinion sets forth the rationale on which Taney relied, and that the first portion was primarily a rhetorical device intended to prepare the reader for what followed, by establishing an analogy between the creation of the Charles River Bridge and the creation of the Warren Bridge. The much-discussed last portion was intended more as a rhetorical device than as a rationale.

The foundations of Taney's opinion were the distinct but related concepts of legislative discretion and community rights. His concern was more with politics than with political economy. After summarizing the record, Taney dismissed the argument that Harvard's ferry rights had been transferred to the proprietors of the first bridge. They had been destroyed, Taney asserted, as a matter of legislative discretion, in favor of the Charles River Bridge. He stated that:

> The petition to the Legislature in 1785, on which the charter was granted, does not suggest an assignment, nor any agreement or consent on the part of the college; and the petitioners do not appear to have regarded the wishes of that institution, as by any means necessary to insure their success. They place their application entirely on considerations of public interest and public convenience, and the superior advantages of a communication across Charles River by a bridge instead of a ferry. The Legislature, in granting the charter, show, by the language of the law, that they acted on the principles assumed by the petitioners . . . . [T]he Legislature deal with the subject, as if it were one exclusively within their own power, and as if the ferry right were not to be transferred to the bridge company, but to be extinguished; and they appear to have acted on the principle that the State, by virtue of its sovereign powers and eminent domain, had a right to take away the franchise of the ferry; because, in their judgment, the public interest and convenience would be better promoted by a bridge in the same place . . . .[162]

The implication was clear: the Charles River Bridge Proprietors, having been born of legislative discretion, should not be heard to

162. *The Charles River Bridge Case*, 36 U.S. (11 Pet.) at 542.

complain when their demise was similarly ordained.

Taney recognized that the legal issue before the Court was narrow, and required the Court "to determine, for the first time, the rules by which public grants are to be construed in this country."[163] The rule he adopted was "that in grants by the public, nothing passes by implication."[164] His reasoning was simple and straightforward. Government and law are established to promote the common good. *Salus populi suprema lex est.* Taney recognized the community as distinct from the state, bearing rights which, while affected by state action, were not rights belonging to the state. The community has a right to expect the state to promote the common good, and to continue to do so. This principle requires that a presumption run against the conclusion that the legislature has diminished its own power to promote the common good in the present, by actions it took or agreements it made in the past. The power to tax[165] and the power to charter internal improvements were examples of government powers presumed to be retained for the common good, but both were merely specific examples of the general principle upon which Taney relied. *The Charles River Bridge Case* was no more about railroads than it was about banks. It was about the public interest:

> [W]henever any power of the State is said to be surrendered or diminished, whether it be the taxing power or any other affecting the public interest, the same principle applies, and the rule of construction must be the same . . . . While the rights of private property are sacredly guarded, we must not forget that the community also have rights, and that the happiness and well being of every citizen depends on their faithful preservation.
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> . . . .
>
> . . . The whole community are interested in this inquiry, and they have a right to require that the power of promoting their comfort and convenience, and of advancing the public prosperity . . . shall not be construed to have been surrendered or diminished by the State, unless it shall appear by plain words that it was intended to be done.[166]

Having settled the general principle, Taney had no need to turn his attention to the specific context of bridges or transportation franchises. Simply to state the principle was to resolve the issue before the Court. His famous dictum concerning the railroads was a rhetorical flourish, an argument from false premises to absurd conclusions. This rhetorical tactic was not uncom-

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163. *Id.* at 546.
164. *Id.* (citing U.S. v. Arredondo, 31 U.S. (6 Pet.) 691 (1832)).
165. *See* Providence Bank v. Billings, 29 U.S. (4 Pet.) 514 (1830).
166. *The Charles River Bridge Case*, 36 U.S. (11 Pet.) at 548-50.

mon.[167] It served to highlight the obviousness of the point that had preceded it. That point, based upon the principle of *salus populi*, was well-settled and longstanding law. Taney ridiculed the rule contended for by Mr. Webster and Justice Story with the caricature set forth in the famous dictum. Historians holding the prevailing view of the case have mistaken caricature for prophecy.[168]

Despite the sense of alarm, despair, and disgust that *The Charles River Bridge Case* raised in the hearts and minds of Story, Kent, Webster, and the old Whigs,[169] their views of the sacrosanct nature of property rights ultimately prevailed in the last half of the nineteenth century, as both William Novak and R. Kent Newmyer have observed.[170] The decision in *The Charles River Bridge Case* was not a harbinger of a new school of thought in constitutional law, as Story and Kent had so deeply feared. In fact, Jacksonian jurisprudence was never worked out in the Supreme Court's constitutional decisions.[171] *Salus populi* remained for the most part a subtext, a principle toward which the Court would gesture, but which was largely ineffectual in nineteenth-century constitutional adjudication.[172]

LATER USE OF THE DOCTRINE OF STRICT CONSTRUCTION

The practical effect of the doctrine articulated in *The Charles River Bridge Case*, that nothing passes by implication in public grants, was hardly the destruction of vested interests or monopolies. Exclusive privileges set forth explicitly in state grants remained enforceable, though subject to compensated takings. In *Enfield Toll Bridge Co. v. Hartford & New Haven R.R.*,[173] the

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167. Certainly it was a case that seemed to lend itself to hyperbole. See Justice McLean's argument based upon this absurd premise, "[s]uppose the Legislature had authorized the construction of an impassable wall, which encircled the ends of the bridge, so as to prevent passengers from crossing on it." *Id.* at 565 (McLean, J., concurring).

168. This is not to suggest that economic development in general, or the development of railroads in particular, was unimportant to Taney and other Americans in this period. The fact that Taney constructed his rhetorical ornament in those particular terms indicates that they were available to him, and that they had some currency at the time. This analysis suggests not that development was unimportant in Jacksonian America, but that it was not the driving force behind the decision in *The Charles River Bridge Case.*

169. See notes 22-27 and accompanying text.

170. *See* Newmyer, cited at note 5, at 154-56, 174; Novak, cited at note 44, at 424-46.

171. NEWMYER, cited at note 23; Boudin, cited at note 23.

172. William Fisher has observed that, over time, the aphorism lost its significance and is now generally considered "vacuous." Fisher, cited at note 44, at 555.

173. 17 Conn. 40 (1845) [hereinafter *Enfield I*].

charter of the plaintiff bridge company included a provision explicitly stating that no other bridge should be built within a specified distance of the plaintiff's bridge.[174] Relying on this provision, the plaintiff sought to enjoin the defendant's construction of a railroad bridge within the protected area.[175] After a lengthy discussion of the case law, including *The Charles River Bridge Case*, the Supreme Court of Errors of Connecticut held as follows:

> [T]he bridge of the defendants will have a tendency, in some degree, to divert travel from the plaintiffs' bridge . . . . Such a fact must impair the value of the plaintiffs' franchise, and diminish their profits . . . .
>
> It was also said, that the damage, if any, arises from the better mode of travel, and therefore, furnishes no cause of complaint. But it does not lessen the injury to the plaintiffs, that the defendants, or the public, derive great benefit from it. They may enquire, can this be done at their expense?
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> . . . .
>
> The result is, that the superior court be advised to grant an injunction.[176]

Clearly, then, the exclusive privilege found in the bridge charter was meaningful and enforceable, provided it was explicitly granted, even after *The Charles River Bridge Case*.

One might be tempted to believe, with Kutler and others, that the injunction granted to protect this exclusive privilege was a formidable and in some sense unyielding barrier to the progress represented by the superseding enterprise. The subsequent history of the *Enfield Bridge Case* reveals, to the contrary, that as a practical matter the exclusive privilege did not provide such complete protection.[177] After the initial decision in *Enfield I*, a committee of "three judicious and disinterested freeholders" was convened, as required by the railroad's charter, to assess the damage done to the plaintiff and impose a compensation award.[178] After hearing both parties, the freeholders determined that the plaintiff had been damaged in the amount of $350.[179] The plaintiffs then refused the defendant's tender of the $350, claiming that they had a right, based on the decision in *Enfield I*, to prevent the defendant's enterprise, not merely to be compensated for the revenues it would divert.[180] In a subsequent pro-

174. *Enfield I*, 17 Conn. at 42.

175. *Id.* at 43.

176. *Id.* at 66-67.

177. Enfield Toll Bridge Co. v. Hartford & N. H. R.R., 17 Conn. 453 (1846) [hereinafter *Enfield II*].

178. *Enfield II*, 17 Conn. at 456.

179. *Id.* at 457.

180. *Id.*

ceeding, in which the plaintiffs' refusal of defendants' tender of compensation was brought to its attention, the Court rejected the plaintiffs' position and refused to enjoin construction of the second bridge.[181]

In 1854 an exclusive charter privilege was held valid by the Supreme Judicial Court of Massachusetts. In *Boston & Lowell R.R. v. Salem & Lowell R.R.*,[182] the Boston & Lowell filed a bill alleging that the Salem & Lowell and two other railroads had conspired to provide service between the two termini of plaintiff's road, in violation of the exclusive privilege explicitly granted in the plaintiff's charter.[183] The Court, by Chief Justice Shaw, held that the exclusive privilege was valid and enforceable.[184] Shaw distinguished *The Charles River Bridge Case*, stating that the Supreme Court never "doubted that a state would be bound by a grant of an exclusive right to a bridge or ferry, made in terms by the legislature; on the contrary, the validity of such a grant was implied."[185] The defendants' demurrer to the bill was overruled, and, in February of 1855, the Court issued an injunction forbidding the defendants from providing the disputed service.[186] In accordance with common practice, however, the Legislature responded the following May by authorizing the three defendant railroads to provide the disputed service, upon payment of compensation to the Boston & Lowell.[187]

The result in *Boston & Lowell R.R.* was consistent with both *The Charles River Bridge Case* and the case of *West River Bridge v. Dix*,[188] in which the Supreme Court upheld the validity of an exclusive charter privilege, and then permitted it to be taken, upon compensation, according to a later charter granted to another corporation.[189] The narrow question before the Court was whether a compensated taking of an exclusive franchise violated the Contracts Clause.[190] Relying in part upon *The Charles River Bridge Case*, the Court held that it did not.[191]

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181. *Id.* at 466.
182. 68 Mass. 1 (1854).
183. *Boston & Lowell R.R.*, 68 Mass. at 2.
184. *Id.* at 38.
185. *Id.* at 34. *See also* The Binghamton Bridge, 70 U.S. (3 Wall.) 51 (1865) (upholding an exclusive bridge franchise and declaring null and void the charter of the superseding bridge).
186. *Boston & Lowell R.R.*, 68 Mass. at 39.
187. Acts of 1855, ch. 386, May 18, 1855; *see also Boston & Lowell R.R.*, 68 Mass. at 42.
188. 47 U.S. (6 How.) 507 (1848).
189. *West River Bridge*, 47 U.S. (6 How.) at 535-36.
190. *Id.* at 530.
191. *Id.* at 535-36. Explicit grants of exclusive franchise rights remained en-

CONCLUSION

The decades of the 1820s and 1830s were shaped by the sense of loss accompanying the passing of the generation of revolutionary heroes, and by anxiety concerning the survival of the republic without their guidance.[192] This post-heroic age came last to the judiciary, with Marshall's death in 1835. The political pessimism that accompanied the ascension of Roger Taney to Marshall's seat contributed to an exaggerated sense of the importance of his first decision, in *The Charles River Bridge Case.* For the surviving members of the "old race of judges" it was an era of disgust, melancholy and loss, captured most articulately in the letters of Kent and Story.[193] Justice Story had expended enormous energy in the attempt to shape a conservative constitutional jurisprudence and invest it with the apparent imprimatur of the Founding Fathers, especially Chief Justice Marshall.[194] As he and his allies understood the case, it threatened their conception of republicanism itself, which was based on the security of property and the "authority of the old settled law." The conservative legal edifice that they had so carefully crafted was under siege by the Jacksonian barbarians at the gate.[195]

Historians have uncritically appropriated this sense of discontinuity and declension, and have vested a small portion of the opinion with disproportionate importance. They have crafted a historiography of *The Charles River Bridge Case* as a choice between two clearly defined, antithetical courses of action, captured

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forceable in the latter part of the nineteenth century. For example, in *New Orleans Gas Co. v. Louisiana Light Co.*, the Court upheld the exclusive rights of a gas company as against a later chartered company, stating, in language reminiscent of Story's dissent in *The Charles River Bridge Case*:

> In order to accomplish what, in its judgment, the public welfare required, the legislature deemed it necessary that some inducement be offered to private capitalists to undertake, at their own cost, this work. That inducement was furnished in the grant of an exclusive privilege . . . . Without that grant it was inevitable either that the cost of supplying the city and its people would have been made, in some form, a charge upon the public, or the public would have been deprived of . . . well-lighted streets.

New Orleans Gas Co. v. Louisiana Light Co., 115 U.S. 650, 670 (1885). *See* New Orleans Water Works Co. v. Rivers, 115 U.S. 674 (1885) (upholding and enforcing exclusive franchise granted to water company); Vicksburg v. Vicksburg Waterworks Co., 202 U.S. 453 (1906) (enforcing exclusive franchise granted by city to water company, against city, which sought to establish its own competing water company).

192. See note 11 and accompanying text.

193. *See, e.g.,* Kent Letter, cited at note 25.

194. NEWMYER, cited at note 4, *passim.*

195. Kent Letter, cited at note 25.

brilliantly in the phrase "privilege and creative destruction."[196] The case has been constructed as a moment in time in which the future was created.

Closer examination has revealed that the widely accepted explanation of the case is misconceived. In fact, jurisdictional limitations unrelated to Jacksonian political economy shaped the case in the Supreme Court as a judicial dilemma, without any corresponding economic dilemma. The jurisdictional exclusion of the doctrine of eminent domain, and the persistent misunderstanding of the application of that doctrine in practice, have contributed to the historiographical misconception of the importance and meaning of the case.[197]

The enormous value of the Charles River Bridge franchise was wildly aberrational in Jacksonian America. That fact alone ought to suggest a skeptical reaction to any analysis of *The Charles River Bridge Case* as an epitome of Jacksonian economic conflict. The recognition of the Court's jurisdictional limitations, together with the longstanding conclusions of economic historians concerning the generally low value of transportation franchises, all suggest that *The Charles River Bridge Case* did not accurately reflect the economic choices faced by Jacksonian America. Furthermore, the fact that the Supreme Court and the lower courts did not hesitate, even after *The Charles River Bridge Case*, to enforce exclusive privileges created explicitly in state charters, suggests that the doctrine announced in the case had little real impact on economic development, and did little more than shift certain burdens in the negotiations of future public utility charters from the states to the entrepreneurs.[198] The case was important to contemporaries because its decision marked the beginning of the post-heroic age of the judiciary, the arrival of the party man Taney, and the destruction of an enormously valuable corporation. Most importantly, it represented the intrusion of Jacksonian jurisprudence into the realm of constitutional law as Justice Story had so carefully crafted it. Though he did not live to see it, Story's views ultimately triumphed in Gilded Age jurisprudence.[199]

196. See notes 32-44 and accompanying text.
197. See notes 94-108 and accompanying text.
198. See note 191.
199. See note 172 and accompanying text.